SERVED: October 4, 1993

NTSB Order No. EM-174

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 24th day of September, 1993

J. W. KIME, Commandant, United States Coast Guard, v. DAVID A. TAYLOR, Appellant.	Docket ME-148

OPINION AND ORDER

The appellant, by counsel, seeks review of a May 6, 1991 decision of the Vice Commandant (Appeal No. 2524) affirming the revocation of his merchant mariner's document (No. 224 50 5056) and license (No. 61555) as ordered by Coast Guard Administrative Law Judge Peter A. Fitzpatrick on November 30, 1990, following a four-day evidentiary hearing that concluded on September 11, 1990.[1] The law judge sustained charges of negligence, violation

[1]Copies of the decisions of the Vice Commandant (acting by

of law, and misconduct in connection with appellant's service aboard the M/V JENNA B on various dates in February and March, 1990.[2] The charge of negligence resulted from the collision of a barge the JENNA B was pushing with a railway bridge on the Eastern branch of the Elizabeth River at Norfolk, Virginia. The violation-of-law charge was predicated on the alleged discharge of oil (apparently between four to five hundred gallons) from the barge, after the collision, into that waterway.[3] The charge of misconduct rests on allegations that the appellant on twelve occasions served as the operator of the JENNA B when his operator's license was under suspension for a charge of negligence sustained in an earlier, unrelated proceeding.[4] As we find no merit in any of appellant's objections to the Vice Commandant's decision, we will deny his appeal.[5]

All of the appellant's challenges to the law judge's disposition of the matter were considered by the Vice Commandant; and from on our examination of the record, we are satisfied that the Vice Commandant correctly rejected them. We will, nevertheless, discuss two of the appellant's contentions, renewed

(..continued)
delegation) and the law judge are attached.

[2]The M/V JENNA B is a 320 gross ton uninspected towing vessel, roughly 137 feet long and 27 feet at its beam.

[3]The statute prohibiting such a discharge is 33 USC 1321.

[4]The prior case, in which appellant's license was suspended for five months (two months outright plus three months remitted on six month's probation), also involved a collision by a vessel appellant was operating.

[5]The Coast Guard has filed a reply opposing the appeal.

on appeal here, not because we believe the Vice Commandant did not fully and fairly resolve the legal issues they raise, but because they appear to present issues we have not previously had occasion to address in a Coast Guard case.

We find no merit in appellant's position that the law judge should have recused himself from the case once he decided to reject a plea agreement the parties had negotiated.[6] Specifically, we neither agree that a law judge, in order to avoid any possible "conflict of interest" that might arise from exposure to information relevant to the settlement discussions, should withdraw from a case *whenever* he has disapproved a plea agreement,[7] nor do we agree that any of the law judge's comments

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[6]Under the agreement, the Coast Guard, in return for appellant's plea of no contest to the three charges, would recommend that his license be suspended outright for 15 months and that his document be suspended out right for 6 months. The term of the license suspension was to include three months for appellant's having had a second violation during the probationary period ordered in his prior case.

[7]A law judge either has or does not have authority to entertain a plea agreement. If he does, and appellant does not argue that the law judge did not have the power to accept or reject the agreement he and the Investigating Officer reached, we fail to see how it can be deemed inappropriate or inadvisable for the law judge to hear a case after rejecting an effort at settlement. We recognize that in criminal cases heard by a jury the jury's factfinding will not be influenced by pre-trial plea discussions with the judge. Nevertheless, not all criminal cases are tried with a jury, and we are unaware of, and appellant does not cite, any cases holding that a judge cannot or should not try a criminal case without a jury if a plea agreement has been disapproved. However, even if our attention were directed to such a holding, we would view the matter no differently, for the strict standards applicable to a criminal trial are not necessarily applicable to an administrative proceeding directed not against an individual, but to his right to hold a seaman license or document.

in connection with his disapproval of the plea agreement in this case reveal that he had prejudged the matter.[8] As to the general issue appellant raises, we see no reason to suspect that a law judge's consideration of the terms of a settlement that is not accepted is any more likely to compromise his ability to decide a case objectively than would be a ruling disallowing as inadmissible any other prejudicial evidence. In either event, the law judge is, we think, presumed able to base a decision on the properly admitted evidence of record, unaffected by factors the law instructs him to disregard. We are not persuaded that such a presumption is not appropriate in the context of an administrative adjudication, as acceptance of appellant's position would require us to hold.

Appellant's contention that the law judge's comments in rejecting the plea agreement demonstrated a prejudgment of the issues, warranting his disqualification, is, in effect, also an attack on the law judge's exercise of his authority to disapprove the plea agreement. To be sure, the law judge in forceful language leaves no doubt that he believed the conduct alleged in support of the misconduct charge against the appellant to be exceptionally serious, expressing the view that operating on a suspended license "goes to the heart of the law" (Transcript at 36). However, the appellant's apparent disagreement with the law judge over the gravity of the charged offense provides no ground

[8]We hasten to add that we perceive no basis for a claim of prejudgment or bias in connection with any facet of the law judge's handling of the hearing in this matter.

questioning the latter's impartiality; and we find no basis for the claim of prejudgment in the law judge's conscientious effort to assess the adequacy of the plea agreement, for that task, by its very nature, obligated the law judge to assume, arguendo, the truth of the facts underlying the charges[9] and to disapprove the agreement if he concluded, as he did, that the charges, if proved, justified a more severe sanction than the agreement contemplated. In short, the law judge did not have to defer to the parties' recommendation on how best to remedy the alleged conduct, and appellant has not shown that the law judge's decision to hear the evidence himself and determine the appropriate order for any charges in fact reflected a prejudgment or bias.

Appellant's contention that the sanction ordered by the law judge and affirmed by the Vice Commandant is excessive also warrants comment. Although the Vice Commandant acknowledged that this is a case of first impression with respect to sanction, he concluded that appellant's intentional and flagrant disregard of

[9]Appellant points to the law judge's questioning of the Investigating Officer as to the basis for his belief that the appellant would be any more likely to comply with the suspension in the plea agreement than he was the suspension in the law judge's prior order. We do not agree that the inquiry bespeaks prejudgment. In the first place, we do not see how the law judge could properly evaluate any agreement seeking to settle a misconduct charge such as the one at issue in this case without asking that question. In the second place, the appellant essentially invited questions concerning the likely effectiveness of the plea agreement by urging its approval. He cannot fairly complain of prejudgment because the law judge used his name in probing the Investigating Officer's assurances that the plea agreement would preclude a repetition of the conduct it ostensibly purported to redress.

a suspension order justified revocation.[10] We agree with that conclusion, and we find no merit in appellant's argument that revocation was inappropriate because his conduct did not, unlike other cases in which revocation has been imposed, present a serious risk of harm. While we do not think that such a factor must be established in order to support revocation, we take issue with the appellant's apparent belief that conduct such as that underlying the misconduct charge against him does not jeopardize marine safety. Because the actions of an individual who lacks respect for authority or shows contempt for it cannot be predicted with any degree of certainty, a genuine issue arises as to such an individual's ability or willingness to conform his behavior to the requirements of law, including vessel operating provisions that are designed to ensure the safety of others. In any event, we see no reason why the Vice Commandant cannot fairly conclude, notwithstanding the absence of precedence, that an individual who refuses to comply with an order suspending his authority to operate a vessel should no longer be entrusted to possess such authority.

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[10] While the issue may be novel in the Coast Guard context, the Board had decided numerous aviation enforcement cases in which operation during the period of an airman certificate suspension was alleged. When such a charge has been upheld, the sanction traditionally has been revocation. See, e.g., Administrator v. Dunn, 5 NTSB 2211, 2213 (1987)("Respondent knew or should have known that his certificate was under suspension and his operation of an aircraft demonstrates such a lack of judgment and responsibility that revocation is warranted. [footnote omitted]").

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is denied, and

2. The orders of the Vice Commandant and the law judge revoking the appellant's mariner's license and document are affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.